

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
1-800-624-3270  
(406) 586-4364  
watercourt@mt.gov

**FILED**  
04/12/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
43B-0698-R-2022  
Lambert, Kathryn  
6.00

MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANT: United States of America (USDA Forest Service)

OBJECTOR: United States of America (USDA Forest Service)

**CASE 43B-0698-R-2022**

43B 59788-00

43B 60121-00

43B 60133-00

43B 190986-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

Claims 43B 59788-00 and 43B 60133-00 have pending amendments. Claim 43B 60121-00 has an issue remark concerning the place of use. The United States of America (USDA Forest Service) objected to claim 43B 190986-00. On February 27, 2023 United States'

Response To Issue Remarks And Proposed Resolution Of Objection ["Response"] was filed. The Response includes changes to elements not at issue on claims 43B 60121-00 and 43B 60133-00. These requests are deemed motions to amend these claims pursuant to section 85-2-233(6), MCA. The Response is viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading." *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments "may adversely affect other water rights." Section 85-2-233(6)(a)(i), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

#### FINDINGS OF FACT

1. For claim 43B 59788-00, the Preliminary Decree includes the following remarks:

AN AMENDMENT WAS SUBMITTED ON 02/22/2018 REQUESTING TO AMEND THE PURPOSE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE TIMELY FILED OBJECTION OF WELCH E. BROGAN WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE MEANS OF DIVERSION . BECAUSE THIS ELEMENT WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY

ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

The Preliminary Decree states that the purpose is COMMERCIAL. The purpose should be INSTITUTIONAL.

The notice remarks concerning the amendment and the timely filed objection should be removed as having served their notice purposes.

2. For claim 43B 60121-00, the changes to the purpose and to the point of diversion legal description requested in the motion to amend arise out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, are based on the same operative facts specified in the Statement of Claim, and merely make more specific that which was already claimed on the original Statement of Claim.

3. For claim 43B 60121-00, the Preliminary Decree includes the following remarks:

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE THE SWNE SEC 5 TWP 3S RGE 15E SWEET GRASS COUNTY.

POINT OF DIVERSION AND MEANS OF DIVERSION WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The Preliminary Decree states that the purpose is COMMERCIAL. The purpose should be INSTITUTIONAL.

The Preliminary Decree states that the point of diversion legal description is the SWNE section 5, T3S, R15E, SWEET GRASS. The legal description should be the SWSE section 5, T3S, R15E, SWEET GRASS.

The Preliminary Decree states that the place of use legal description is section 5, T3S, R15E, SWEET GRASS. The legal description should be the SWSE section 5, T3S, R15E, SWEET GRASS. The place of use issue remark should be removed as addressed and resolved.

The notice remark concerning point of diversion and means of diversion should be removed as having served its notice purpose.

4. For claim 43B 60133-00, the change to the point of diversion legal description requested in the motion to amend arises out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, is based on the same operative facts specified in the Statement of Claim, and merely makes more specific that which was already claimed on the

original Statement of Claim.

5. Claim 43B 60133-00, the Preliminary Decree includes the following remarks:

AN AMENDMENT WAS SUBMITTED ON 02/22/2018 REQUESTING TO AMEND THE SOURCE NAME. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

POINT OF DIVERSION AND SOURCE NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The Preliminary Decree states that the source is SPRING, UNNAMED TRIBUTARY OF NEEDLE CREEK. The source should be SPRING, UNNAMED TRIBUTARY OF SAWMILL GULCH.

The Preliminary Decree states that the point of diversion legal description is SESWNE section 24, T2S, R14E, SWEET GRASS. The point of diversion legal description should be SWNE section 24, T2S, R14E, SWEET GRASS.

The notice remark concerning the amendment and the notice remark concerning the point of diversion and source name should be removed as having served their notice purposes.

6. Claim 43B 190986-00 appeared in the Preliminary Decree with the following remarks:

USE OF THE ARMSTRONG DITCH TO CONVEY WATER TO THE PLACE OF USE MAY BE QUESTIONABLE.

SOURCE NAME , POINT OF DIVERSION, AND DITCH NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The Response states that this claim is withdrawn. This claim should be dismissed as withdrawn.

#### CONCLUSIONS OF LAW

1. The requested amendments for claims 43B 60121-00 and 43B 60133-00 do not adversely affect other water rights as they are corrections to the abstracts which do not make any changes to the actual historical use of the claimed rights on the ground. Notice by publication of these amendments is not required. Section 85-2-233(6), MCA.

2. Each requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

3. The Response is sufficient to contradict and overcome the prima facie claims as

they appeared in the Preliminary Decree and sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

#### RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the motions to amend claims 43B 60121-00 and 43B 60133-00, and make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

#### **ELECTRONICALLY SIGNED AND DATED BELOW**

#### Service Via Email:

Romney S. Philpott, Trial Attorney  
US Department of Justice  
ENRD, Natural Resources Section  
999 18th Street, South Terrace Suite 370  
Denver, CO 80202  
(303) 844-1810  
romney.philpott@usdoj.gov  
montanabasins.enrd@usdoj.gov

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 59788-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** USA (DEPT OF AGRICULTURE FOREST SERVICE)  
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION  
26 FORT MISSOULA RD  
MISSOULA, MT 59804 7203

**Priority Date:** OCTOBER 13, 1969

**Type of Historical Right:** USE

**\*Purpose (use):** INSTITUTIONAL  
ELK HUNTING CAMP

**\*Flow Rate:** 4.48 GPM

**\*Volume:** 0.01 AC-FT

**\*Source Name:** BASSETT CREEK  
**Source Type:** SURFACE WATER

**\*Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWNW	22	8S	8E	PARK

**Period of Diversion:** OCTOBER 1 TO NOVEMBER 30

**Diversion Means:** BUCKET  
MEANS OF DIVERSION INCLUDES A POT, PAN OR OTHER CONTAINER.

**Period of Use:** OCTOBER 1 TO NOVEMBER 30

**\*Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESWNW	22	8S	8E	PARK

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 60121-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** USA (DEPT OF AGRICULTURE FOREST SERVICE)  
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION  
26 FORT MISSOULA RD  
MISSOULA, MT 59804 7203

**Priority Date:** APRIL 20, 1959

**Type of Historical Right:** USE

**\*Purpose (use):** INSTITUTIONAL  
TODD CABIN

**Flow Rate:** 44.88 GPM

**Volume:** 0.50 AC-FT

**Source Name:** LOWER DEER CREEK  
**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSE	5	3S	15E	SWEET GRASS

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** BUCKET

**Period of Use:** MAY 1 TO SEPTEMBER 30

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSE	5	3S	15E	SWEET GRASS

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 60133-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** USA (DEPT OF AGRICULTURE FOREST SERVICE)  
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION  
26 FORT MISSOULA RD  
MISSOULA, MT 59804 7203

**Priority Date:** SEPTEMBER 4, 1902

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** 26.93 GPM

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SPRING, UNNAMED TRIBUTARY OF SAWMILL GULCH

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNE	24	2S	14E	SWEET GRASS

**Period of Diversion:** JULY 1 TO OCTOBER 31

**Diversion Means:** SPRING BOX

**Period of Use:** JULY 1 TO OCTOBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWNE	24	2S	14E	SWEET GRASS



**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:**      **43B 190986-00**    STATEMENT OF CLAIM

**Version:**      4 -- POST DECREE

**Status:**      **DISMISSED**

**Owners:**                      USA (DEPT OF AGRICULTURE FOREST SERVICE)  
                                      WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION  
                                      26 FORT MISSOULA RD  
                                      MISSOULA, MT 59804 7203

**Priority Date:**

**Type of Historical Right:**

**Purpose (use):**                      STOCK

**Flow Rate:**

**Volume:**

**Source Name:**                      MULHERIN CREEK

**Source Type:**                      SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

---

**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.